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Supreme Court of the United States

OCTOBER TERM, 1978

78-335

No. ____

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioner,

vs.

ROBERT LaFONTAINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT A. STRAUB
407 One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48037
Phone: (313) 552-5000

JAMES M. BAYSINGER
JONATHAN S. TAUB
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
Phone: (313) 259-1144

Counsel for Petitioner

Of Counsel:
CROSS, WROCK, MILLER & VIESON
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
Phone: (313) 259-1144

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

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Petitioner, The Chesapeake and Ohio Railway Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the order entered April 18, 1978 in Case No. 76-2491, entitled *Robert LaFontaine, Plaintiff-Appellee* v *The Chesapeake and Ohio Railway Company, Defendant-Appellant*, and the order of that court denying Petitioner's Petition for Rehearing.

OPINIONS BELOW

The order of the Court of Appeals is unreported, and is printed in the attached Appendix at p. A1.

The first opinion of the district court, conditionally granting petitioner's motion for summary judgment is unreported, and is printed in the Appendix at p. A5. The subsequent order of the district court, which gives rise to this petition, was not accompanied by an opinion; said order is printed in the Appendix at p. A3.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on April 18, 1978. On June 1, 1978 the order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing en banc was entered. That order is printed in the Appendix, p. A2. This petition is, therefore, timely.

This Court's jurisdiction is invoked under 28 USC § 1254(1) and Rule 19 of the Rules of this court.

QUESTION PRESENTED

Where a railroad and union, pursuant to the Railway Labor Act, agree to establish a special adjustment board to which an employee's claim for wrongful discharge is submitted by his union on his behalf and with his full

knowledge and authorization, is, as United States Court of Appeals for the Sixth Circuit ruled, the award of that board upholding the discharge, subject to attack as violative of due process of law solely because the board did not give the employee actual notice of the board's hearing or is the board entitled to rely on the union's continuing and unrevoked authority to represent the employee as this Court and the Court of Appeals for the Seventh Circuit has indicated.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

45 USC § 153 First (j):

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

45 USC § 153 First (i):

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the

carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 USC § 152, Third:

"Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

45 USC § 152, Fourth:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any

way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

29 CFR § 1207.4(b):

"*Filing of agreements.* The original agreement creating the PL Board under Public Law 89-456 shall be filed with the National Mediation Board at the time it is executed by the parties. A copy of such agreement shall be filed by the parties with the Administrative Officer of the National Railroad Adjustment Board, Chicago, Ill."

29 CFR § 1207.2(c):

> "Docketing of PL Board agreements: The National Mediation Board will docket agreements establishing PL Board, which agreements meet the requirements of coverage as specified in Pub. L. 89-456. No neutral will be appointed under § 1207.1(c) until the agreement establishing the PL Board has been docketed by the Mediation Board."

STATEMENT OF THE CASE

This case arises under the Railway Labor Act, specifically 45 U.S.C. § 153, First (p), and (q), and § 153, Second.

Respondent ("plaintiff"), a former employee of petitioner ("defendant"), was discharged from his employment as the result of an altercation on defendant's premises on April 26, 1971.

Plaintiff's discharge was appealed by his duly authorized bargaining representative, the United Transportation Union, in accordance with the provisions of the collective bargaining agreement between defendant and plaintiff's representative, United Transportation Union.

Pursuant to the provisions of the Railway Labor Act, defendant, The Chesapeake and Ohio Railway Company, and the United Transportation Union entered into an agreement under the provisions of 45 U.S.C.A. § 153 Second, to submit the matter of plaintiff's claimed wrongful discharge to Public Law Board 347 for resolution. Plaintiff authorized his union (United Transportation Union) to handle the appeal to Public Law Board 347, and was aware of the fact that

L. J. Wojtaszak, General Chairman, United Transportation Union, was handling the appeal of plaintiff's grievance to Public Law Board 347. Additionally, under the provisions of Article 44 of the Constitution of the United Transportation Union, said Union had authority to represent plaintiff in the handling of his claim of wrongful discharge. Plaintiff did not at any time claim that he revoked the authority of the United Transportation Union to handle his claim. In due course, Public Law Board 347 rendered its decision, upholding the position of the defendant that the discharge of plaintiff was justified.

Thereafter plaintiff commenced this action seeking reinstatement with back-pay, or in the alternative, that the adverse award of Board 347 be set aside and the matter be remanded for a new hearing. Defendant moved for summary judgment. On February 11, 1975, District Judge James P. Churchill, in a written opinion (reprinted in the Appendix, *infra*, p. A5), granted defendant's motion, but allowed plaintiff time within which to file an amended complaint, and entered his order to that effect (reprinted in the Appendix, *infra*, p. A4).

Within the time limited, plaintiff filed an amended petition realleging the claims in his original petition and adding:

> "2. Public Law Board No. 347 violated the Act USC § 153 by failing to give plaintiff notice of the hearing conducted by said Board in this case.
>
> "3. Plaintiff incorporates by reference the affidavit previously submitted by him in this action denying receipt of a notice of hearing."

Subsequently, plaintiff moved for summary judgment and on his amended petition claiming lack of notice to him of the hearing before Board 347. Following briefing and argument, Judge Churchill granted plaintiff's motion without opinion, and entered an order (reprinted in the Appendix, *infra*, p. A3) setting aside the award of Board 347 and remanded the matter for rehearing on the merits. Defendant thereafter filed a motion for rehearing, which was denied without opinion.

Defendant then filed its appeal with the United States Court of Appeals for the Sixth Circuit from the adverse order and the denial of defendant's motion for rehearing.

In his affidavit attached to the brief in opposition to his motion for summary judgment, plaintiff averred:

> "7. That at no time did I receive any notice whatsoever of the hearing, if any was held, before the Public Law Board. Further at no time did the Board give me notice of my right to a hearing."

In his deposition, plaintiff denied receiving written or oral notice of the hearing before the Board from anyone. His union representative promised to advise plaintiff when the Board convened so that he could assist in presenting his case. Although plaintiff discussed his case with the representative 10 or 12 times, he never heard from him until the award had been rendered. Plaintiff, however, authorized the union to handle the appeal, asked the union to make the submission, and knew his case was pending before Board 347.

There was no written or transcribed opinion on the grant by the District Court of plaintiff's motion resulting in the remand and the appeal to the United States Court of Appeals for the Sixth Circuit, but the foregoing evidence was before the District Court at the time of its order and it is the only evidence touching on the issue of notice.

On April 18, 1978, the United States Court of Appeals for the Sixth Circuit affirmed (reprinted in the Appendix, *infra*, p. A2) the judgment of the District Court, stating that its previous decision in *Cole* v *Erie Lackawanna Ry Co*, 541 F2d 528 (6th Cir, 1976) was dispositive of the appeal. On June 1, 1978, the Sixth Circuit denied (reprinted in the Appendix, *infra*, p. A1) defendant's petition for rehearing.

Defendant now seeks review of the Court of Appeals' decision of April 18, 1978 and of its order of June 1, 1978, denying the petition for rehearing.

ARGUMENT

A. Introduction

In 1966, Congress adopted legislation[1] passed upon by the Sixth Circuit in this case creating an entirely new scheme for the adjudication of "minor"[2] disputes arising under the Railway Labor Act — disputes which involve interpretation or application of collective bargaining agreements in the industry, and employee

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[1] Public Law 89.-456.80 stat § 208 (effective June 30, 1966).

[2] *Elgin, J & E R Co* v *Burley*, 325 US 711 (1945).

grievances. Prior to that legislation, resolution of minor disputes was within the sole jurisdiction of the National Railroad Adjustment Board (NRAB). Dissatisfaction by Congress with docket congestion of the Adjustment Board prompted the 1966 legislation which "drastically revise[d] the procedures to remedy the defects," as the Court itself observed in *Walker* v *Southern Ry Co*, 385 US 196 at 198 (1966).

The 1966 legislation, although retaining the Adjustment Board, added an alternative forum for disposition of minor disputes, called "special adjustment boards." The statutory jurisdiction of such boards is the same as that of the older NRAB, but the similarity ends there for special adjustment boards (or "public law boards" as they are more commonly referred to), unlike the NRAB, are not standing bodies of appointed arbitrators prone to develop a case backlog, but were designed to be created speedily by the parties on an ad hoc basis to resolve promptly a specific dispute or (as here) several disputes, following which the board automatically dissolves.

In the usual situation, the convening of a public law board is a rather simple matter. Upon request of either the union or the railroad to the other, the two are required by law to enter into a written agreement within 30 days to establish a public law board. The agreement must be filed with the National Mediation Board [29 CFR § 1207.4(b)] and is docketed if agreement meets "the requirements of coverage as specified in Pub. L. 89-456" [29 CFR § 1207.2(c)]. The board is composed of a representative of each of the union and the railroad, and a neutral member selected by the parties (as in this case) or appointed by the National Mediation Board at the request of either party. Statutory provision is made for resolution of any disagreements

concerning convening of the public law board by the National Mediation Board.

Unlike the statutory procedure governing the older NRAB under which an employee (as well as a railroad or union) may on his own invoke its jurisdiction, the amendatory legislation of 1966 allows only the union or the railroad, and not an employee to convene a public law board. This departure from the older procedure was not a matter of congressional inadvertence. Congress wished the process to be speedy and thus excluded direct employee claims:

> "When either party requests a special adjustment board, the committee contemplates that a number of disputes will be referred to that board. The committee believes it would only result in a proliferation of special boards to request a special board for each claim presented by an employee.
>
> "Carrier witnesses testified that many of the claims presented by employees and disputes referred to the Board are frivolous or at least without merit. Although the committee is not prejudging any claims, it believes that claims should be carefully screened by the party submitting it. The committee believes that the merits of every claim should be carefully considered by both the carrier and employee representative in an attempt to resolve the dispute before submission to the Board."[3]

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[3] S. Rep. 1201, 89th Cong., 2nd Sess. (1966) Code Cong. & Admin. News, p. 2286.

Certainly an employee whose grievance has been submitted to a public law board has rights concerning his claim. But just what those rights may be and just who has the duty to protect his interests has not been decided by this Court. However, the Court of Appeals for the Sixth Circuit has begun to define those rights and to assign those duties in this and one other case, *Cole* v *Erie-Lackawanna Ry Co*, 541 F2d 528 (1976), which the Court declined to review [433 US 914 (1977)]. This case, involving much different facts than *Cole*, was disposed of by the Court of Appeals solely and summarily on the basis of that decision.

Taken together, the decision below and the *Cole* opinion mark the departure of the Sixth Circuit from the traditional wisdom of opinions of this Court and the Seventh Circuit, and its embarkation on a journey through the compulsory arbitration provisions of the Railway Labor Act, the eventual destination is unknown.

Public law boards now and for some time have carried the major share of the burden of resolving union disputes in the railroad industry as the following table demonstrates:

YEAR	NRAB CASES Disposed Of	P. L. BOARD CASES Disposed Of
1976[4]	886	5606
1975[5]	1033	5404
1974[6]	1322	6439
1973[7]	1387	N/A
1972[8]	1313	3718

Because the public law board mechanism has become the major vehicle for resolution of minor disputes under the Railway Labor Act, we respectfully suggest that the time has come for this Court to consider for the first time the rights of the employees and whose duty it is to protect them, and thus whether the approach of the Sixth Circuit coincides with the intent of Congress. This petition, seeking review of issues which go precisely to those areas, presents this Court with an ideal opportunity.

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[4] Forty-Second Annual Report of the National Mediation Board, at 56-57.

[5] Forty First Annual Report of the National Mediation Board, at 43-45.

[6] Fortieth Annual Report of the National Mediation Board, at 43-44, 78.

[7] *Ibid*.

[8] Thirty-Eighth Annual Report of the National Mediation Board, at 45-46, 97.

B. The Order of the Court of Appeals for the Sixth Circuit in tandem with its opinion in Cole v Erie-Lackawanna Ry Co, 541 F2d 528, misconceives the nature and purpose of Railway Labor Act amendment creating the public law board mechanism.

The order below was entirely based upon the Sixth Circuit's still recent decision in *Cole*. *Cole* ruled that an employee whose grievance has been submitted to a public law board is entitled to the benefits 45 USC § 153 First (j). That provision reads:

> "Parties may be heard either in person, by counsel, or by other representatives as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The Sixth Circuit in *Cole*, finding no reason not to apply this portion of the statute governing the National Railroad Adjustment Board to that part of the statute providing for public law boards, but purporting to find support in the legislative history of the public law board amendment, so ruled. Since the notice provision of the statute had not been complied with in *Cole*, nor in this case, the Sixth Circuit in both instances affirmed lower court orders upsetting otherwise valid public law board awards.

Whether the Sixth Circuit correctly ruled that the 1966 public law board legislation "incorporated [existing Section 153 First (j)] by implication" [541 F2d at 533],

depends upon whether the court correctly concluded that public law boards were legislatively intended to be congruent to the railroad adjustment board. While it is clear, as the Sixth Circuit concluded, that Congress intended to "remove the backlog of cases"[9] which has been accomplished by the proliferation of public law boards, it is equally clear that Congress, in addition, wished to "provide an expeditious means of handling future cases."[10] Obviously, wholesale importation of Section 153 First (j) into public law board procedure cannot possibly alleviate the NRAB backlog. Instead, as we will demonstrate, such a construction of the 1966 amendment frustrates achievement of the other legislative goal of expeditious handling. For if Section 153 First (j) applies then so must the panoply of employee rights guaranteed by this Court's decision in *Elgin, J & E R Co* v *Burley*, 325 US 711 (1945) (I).

In *Elgin, J & E R Co* v *Burley, supra*, this Court established once and for all a railroad employee's right individually to participate at all stages in the handling of his grievance, and ruled that Section 153 First (j) accorded him the individual rights to notice of and to take part in NRAB hearings. Critical to this case and *Cole* is the fact that *Burley (I)* arose out of the interplay of those individual employee rights with the authority of his union to act for him. This court there concluded that, except to the extent the employee had authorized his union to act for him, he was entitled to handle his

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[9] S. Rep. 1201, 89th Cong., 2nd Sess. (1966) Code Cong. & Admin. News, p. 2286.

[10] *Ibid*.

own case in his own way. This was the law in 1966 and remains so to this day. Thus, if Section 153 First (j) is to be imported into the public law board proceedings, as the Sixth Circuit has ruled here and in *Cole*, then by definition so is *Burley (I)* along with its subordination of union authority to the employee's right to handle his own case in his own way.

Clearly Congress did not so intend. It specifically stated that the merits of each claim should be considered prior to submission to a public law board. This congressionally contemplated screening process without question implies that the employee's union has the authority *not* to submit his claim at all. Put another way, the screening process implies union authority to deny the employee himself any access to a public law board since the union, and not its member, may cause the convening of a board. Put still another way, the screening process beyond cavil implies that the union member is entitled to no say in his union's decision not to submit his claim to a public law board.

There is yet another implication from the screening process. Since his union can deny the employee any access to a board, by the same token, it can decide the manner in which the claim is submitted to the board; for should the employee disagree with his union's approach, the screening process implies that the union has the authority then to refuse to submit the claim at all.

Taken together, the consequences of these implications from the screening process are on their face inconsistent with, if not repugnant to, the *Burley (I)*

bundle of rights arising from Section 153 First (j). For as this court observed:

> "In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier.
>
> * * * *
>
> "His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance *if the union*, by coming to agreement with the carrier, *could foreclose his claim altogether at the threshold of the statutory procedure*. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's." *Burley (I)*, 325 US at 736. (emphasis added)

But, as we have demonstrated, the union *can* foreclose *access* by the employee to a public law board, and such being the case, and it being the express intent of Congress that the public law boards expeditiously process their cases, it follows that Congress intended to restrict *Burley (I)* rights and the impedimenta consequent upon their exercise to the Adjustment Board milieu, and not to import them wholesale into the public law board arena. The two forums, we submit, are therefore not congruent and the Sixth Circuit, here and in *Cole*, erred in implicitly equating them.

This is not to say that the 1966 amendatory legislation was intended to overrule *Burley (I)* and by that token vest the union with czar-like power over its member's

claim. To the contrary, *Burley (I)* clearly forbids a union from convening a public law board against the express wishes of its member who may desire to exercise his *Burley (I)* rights and thus to take his case to the Adjustment Board. And, of course, that employee's union still cannot compromise his claim without authority. And it surely follows that *Burley (I)* accords the employee the right, even after his case has been submitted to a public law board, to revoke his union's authority and thus to take his claim to the Adjustment Board. But the 1966 amendatory legislation, given the expression of congressional intent gleaned from the legislative history, was meant, first, to exclude employee participation in the new public law board process and, therefore, to empower his union to act for him through to conclusion.

To be sure, the employee is entitled to have his claim presented to the public law board in proper fashion and to be represented adequately. Again, however, the 1966 amendatory legislation, given the intent of Congress that the process be expeditious, meant to impose the duty to protect those rights on the union, and not the public law board, Were it not so, the integrity of the new mechanism is impeached and the intent of Congress goes unfulfilled. Surely Congress was aware of the ramifications of *Burley (I)* when it excluded employee participation in the public law board process. Thus, it must have recognized that the union's authority over its member's claims once in the public law board process would be enhanced, and that abuse of that authority was possible. However, Congress intended the process to be expeditious, a goal that

cannot be achieved if there is a duty to protect against abuse of union authority on the part of the public law board in cases, such as here and in *Cole*, where there is nothing to indicate that the union is acting contrary to the wishes of its employee. A claim cannot be expeditiously processed if, as in the Adjustment Board setting, the employee is in each case entitled to be present when the Board meets, and then and there to add to, change or disagree with his union's submission of facts, interpretation of applicable agreements, and arguments or else an award unfavorable to the employee can be upset. We think it clear that Congress, given the legislative history and the ramifications flowing from it, concluded that railroad unions could be trusted not to abuse their authority before a public law board, and that in isolated instances of abuse, the now well-developed doctrine of fair union representation is available to recompense the employee. See *Pyzynski* v *New York Central RR Co*, 421 F2d 854, 862 (2nd Cir, 1970).

The facts of the case below dramatically demonstrate the error of the Sixth Circuit in its attempt to discern the intent of Congress. Appellee here desired to be present when the public law board met.

> ". . . I asked him to let me know when the Board would convene so I would have a chance to defend myself, because I knew that transcript better than anybody else did and I would be able to enlighten the board to bring out contradictory statements, lies, that would certainly enhance my chances of getting back, proving my innocence." (50a)

There is no claim, as there was in *Cole*, that appellee was given wrong advice by the union, nor was there any evidence, as there was in *Cole*, that appellee did not understand the workings of the Board. There is no claim that the union failed adequately to present the case. To the contrary of *Cole*, appellee here, one can only gather, thought he could have done a better, more forceful job than his union, a not uncommon complaint of a losing party to any manner of case, but certainly not a complaint of prejudice. LaFontaine, then, extends *Cole* and its importation of *Burley (I)* employee rights from cases involving prejudice from union misfeasance at the public law board level to those in which union mishandling is absent and in which the only prejudice is in the result. Clearly, this cannot be what Congress had in mind in 1966 when it established an alternative mechanism to be utilized by unions for the expeditious processing of employee claims.

The National Mediation Board, charged with administration of the 1966 amendatory legislation, has taken note of *Cole* and has characterized its reach:

> "The sixth circuit's decision in *Cole* v *Erie Lackawanna Ry.*, supra, not only substantially broadened the meaning of 'due notice' under section 3, first (j) of the act, it also held the section and all of the rights it contains applicable to public law board proceedings. *Previously, section 3, first (j) only had been held to apply to proceedings of the National Railroad Adjustment Board.*" Forty-Second Annual Report, *supra*, n. 4, p. 25 (emphasis added).

We respectfully submit that the Sixth Circuit has grossly misread the intent of Congress and that, in so doing, it has jeopardized the validity of hundreds of public law board awards, and compromised the public law board as a mechanism for resolving employee claims.

Even if our construction of the 1966 amendatory legislation is in the end mistaken in whole or in part, we suggest the matter of employee rights in the public law board process and the question whose duty it is to protect them should at last be decided by this Court because it is too important to the proper functioning of the Railway Labor Act to be left standing as it is now.

C. The order of the Sixth Circuit below, in tandem with Cole v Erie-Lackawanna Ry Co, supra, misapplies this Court's opinion in Burley v Elgin, E. J. & E. R. Co, (I), supra and is therefore in conflict with a decision of the Seventh Circuit.

In the preceding section of this petition, we demonstrated the error of the Sixth Circuit here, and in *Cole*, in importing wholesale into the public law board mechanism the employee rights enunciated by this Court in *Burley (I)*. This section of our petition, however, proceeds on the assumption, arguendo, that our position there is wrong and that, thus, *Burley (I)* does apply in the public law board process to the same extent it applies to the National Railroad Adjustment Board mechanism. Even so, the Sixth Circuit here and in *Cole* misinterpreted *Burley (I)* and thus its order here is in conflict with a decision of the Seventh Circuit.

After release of its opinion in *Burley (I)*, this Court, upon rehearing, considered the nature of the notice which *Burley (I)* required to be given an employee to permit him to protect his rights in connection with disposition of his grievance and, in addition, took up the question of the extent to which his union might be authorized to act for him in that regard, *Elgin, J & E R Co* v *Burley*, 327 US 661 (1946) (II). There this Court recognized that, in the Adjustment Board setting, the union's authority to act on behalf of the employee is entitled to "presumptive weight," 327 US at 664, and indicated that such authority could be conferred by the constitution of the union organization of which the employee was a member, 327 US at 665, n. 2. Having ruled on the presumption in favor of the union's authority, this Court cautioned that:

> ". . . [W]e did not rule, and there is no basis for assuming we did, that an employee can stand by with knowledge or notice of what is going on with reference to his claim, either between the carrier and the union on the property, or before the Board on their submission, allow matters to be thrashed out to a conclusion by one method or the other, and then come in for the first time to assert his individual rights." 327 US at 666, 667 (emphasis supplied).

This Court, however, declined to define what was meant by "due notice":

> "But we did not undertake to define what was meant by 'due notice,' nor do we now. 'Due notice' conceivably could be given or had in a variety of forms, more especially when account is taken of the generally informal procedure of the Board. It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency." 327 US at 666, n. 9.

Both in the case below and in *Cole*, the Sixth Circuit construed *Burley II* "due notice" to mean:

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." Appendix, p. A2; 541 F2d at 534.

Such a statement of "due notice," cast as it is in terms of *when* the notice must be given or had, is perplexing, if not incongruous, in the factual context here and in *Cole* because, although no formal notice was given in either case, each employee in fact knew early on that his claim was before a public law board. Therefore the message apparently intended to be conveyed by the quoted sentence is that public law boards must furnish each employee notice not only of "pendency of the proceedings," but even beyond that, some instruction in the workings of the public law board and of his right to revoke the authority of his union thus permitting him to handle his own case in his own way.[11]

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[11] See the *Cole* court's reference that Cole "did not understand the workings of Board" [541 F2d at 535] and that Cole "was foreclosed from making the very decision [to represent himself or to be represented by counsel or by union representatives] which § 9 First (j) empowers him to make; thus, his failure to act affirmatively cannot be held to have been a waiver of his right." 541 F2d at 535, 536.

We respectfully submit that neither *Burley* case supports such a construction of the "due notice" provided for in Section 153 First (j), and, indeed, such a construction is contrary to *Burley (I)* and *(II)*. For what the Sixth Circuit lost sight of is that *Burley (I)* and *(II)*, although defining employee rights, involved the larger — much larger — question, namely to what extent and under what circumstances are such employee's rights waived or lost when his union undertakes to represent him and during such representation. *Burley* (II) made it clear that if the union had authority at the outset to handle the employee's grievance then, without regard to lack of notice from the Adjustment Board, the employee must take action to revoke such authority or be bound by the end result. Of this there can be no doubt, for in remanding for further proceedings, this Court in *Burley* (I) stated:

> "Since upon the total situation we cannot say as a matter of law that respondents had authorized the Brotherhood to act for them in Docket No. 7324, whether in submitting the cause or in representing them before the Board; since it is conceded also that they were not given notice of the proceedings otherwise than as the union had knowledge of them; and since further they have denied that they had knowledge of the proceedings and of the award until after it was entered, the question whether the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. *The crucial issue in this respect, of course, will be initially whether respondents had authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the Board's proceedings in Docket No. 7324.*" 325 US at 748 (emphasis supplied).

Neither *Burley* case required or compelled the Adjustment Board to notify the employee of anything other than that his claim had been submitted, nor did it cast the Adjustment Board in the role of the protector of the employee's right to represent himself or to be represented by counsel rather than by his union, as the Sixth Circuit has done here and in *Cole*.

The view of the Sixth Circuit necessarily proceeds from its erroneous and unjust assumption that the union may not or cannot or should not be trusted to deal fairly with its members, and that the Adjustment Board therefore ought in each case to undertake in effect to see that it does so. Surely, no support for such an assumption can be found in either *Burley* case; to the contrary, the presumption in favor of union authority to represent its member presupposes that the union will act responsibly.

Furthermore, the Adjustment Board has never been held to have any authority to act on employee claims of union misbehavior because Section 153 First (i) limits the Adjustment Board's jurisdiction to disputes between railroads and employees and because the union members on the Adjustment Board would be presumably hostile in a union-member dispute.[12] If the Adjustment Board lacks authority to intrude into the union-member relationship to redress a member's grievance, then by parity of reasoning it would be unseemly to compel it to intrude into the very same relationship for the purpose of advising the employee of his right to revoke the union's authority to

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[12] See, e.g., *Steele* v *Louisville & N R*, 323 US 192 (1944); *Conley* v *Gibson*, 353 US 41 (1957); *Glover* v *St. Louis & S.F. R*, 393 US 324 (1969).

represent him or otherwise to undertake to advise him of the rights his union is duty-bound to protect.[13]

Imposition on the public law board of a duty to notify (or perhaps "warn" is a more accurate word), implies as well a duty to make certain that the notification is effective. Discharge of that correlative duty could be achieved only if the public law board, as well as ruling on the merits, were also required to conduct an inquiry into the reason for an employee's failure to participate in his case wherever and whenever only his union was heard from. Since it can be safely assumed that the union will not impeach before the Board its authority to act for its member nor that the railroad will idly stand by if possessed of knowledge that the union lacks authority, something more than employee silence or representations from his union, is required — perhaps something in writing from, or perhaps face-to-face board communication with the employee himself — followed by a finding by the Board that the union has or has not full authority to act. Whatever form independent[14] board inquiry may take,

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[13] Since a railroad is required to have representation on either an Adjustment Board or a Public Law Board, a railroad, which is in an adversary position to the employee, would perforce be compelled to insert itself into the employee's relationship with his union, an intrusion which, in any other context, is illegal. See 49 USC § 152, Third and Fourth.

[14] Because the vote of any two members of a public law board governs, it is entirely possible that the railroad and union board member could make a valid and non-reviewable finding of authority over the dissent of the neutral member. This anomalous result is yet another reason why such matters were not intended to be entrusted to any Board, and further indication of the extent of the Sixth Circuit's error in implicitly so holding.

the consequent fact-finding of union authority *vel non* launches the board improperly into resolution of union-member disputes, for an adjudication that no authority dispute exists [i.e., the employee agrees that the union has authority to act] is as much an exercise of Board jurisdiction as the contrary finding that a dispute exists and the resolving of it [i.e., the union, despite its claim to the contrary, lacks authority to act].[15] And that, as we understand the holdings of this Court, is impermissible.

We suppose it once might have been said that *Cole* is factually unique so that only where the employee's union imparts advice that effectively deprives him of his rights before an Adjustment Board or public law board, can an otherwise valid award be set aside.[16] The case below, however, now makes it clear that the Sixth Circuit intends *Cole* to have broad applicability.

In *LaFontaine*, the employee wished to be present at the meeting of the public law board so that he could assist the union in presenting his case. Although the union apparently promised to advise him about the meeting, it did not do so and, of course, no formal

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[15] Compare the juristic similarity to the jurisdiction of a court to determine that it lacks in personam jurisdiction: such a decision is binding on the parties and is, of course, a "decision," notwithstanding that the court, by its own ruling, concluded that it lacked jurisdiction in the first instance. 20 Am Jur 2d, *Courts*, § 92.

[16] Perhaps the narrow factual context was one reason why this Court denied certiorari in *Cole* 433 U.S. 914 (1977) notwithstanding that the Solicitor General urged that the writ be granted and that the Sixth Circuit be reversed.

notice was given by the Board. LaFontaine, however, was aware that his case was before the Board and that his union was processing it on his behalf. By virtue of his union's constitution, the United Transportation Union was granted not only complete authority to act in its member's behalf to submit claims and grievances to any tribunal unless the member serves the union with reasonable written notice to the contrary, but also authority

> ". . . to receive notice of hearings, or to waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances." (54a)

The public law board specifically found that "due notice of hearing" was given the union, (8a). There is not a scintilla of evidence that LaFontaine was misadvised of his *Burley (I)* rights. There is no claim that LaFontaine's case was not properly handled by his union before the Public Law Board nor is there any claim that LaFontaine had any evidence known only to him that was not communicated to his union or by his union to the board. There is no evidence that LaFontaine did not wish his union to continue to represent him or that he told either the Board or the railroad of his desire to be present, and there is no evidence that he did not understand the workings of the Board. Yet on these facts, the Sixth Circuit ruled:

> ". . . In *Cole* v *Erie Lackawanna Railway Co.*, 541 F.2d 528 (1976), cert. denied, 433 U.S. 914 (1977), this court held that actual notice of a

> hearing is required 'for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim.' We conclude that the quoted language is dispositive of this appeal." Appendix, p. A2.

Thus, although no prejudice arising from the Board's failure to give formal notice to LaFontaine was or could be shown, the Sixth Circuit rigidly and summarily applied *Cole*. It can no longer be thought that *Cole* is limited to its facts and other situations involving prejudice to the employee. *Cole* now applies to every case pending before a public law board. Such a result is contrary to both *Burley* cases because it completely ignores the presumption of unrevoked union authority to act on its employee's behalf and permits the employee to sit idly by until an adverse award is rendered, coming in then for the first time to assert his rights.

To the contrary of the Sixth Circuit's order below is *Kotakis* v *Elgin, J & E R*, 520 F2d 570 (7th Cir), cert. den. 423 US 1016 (1975), involving the review of an award of the Adjustment Board. There, Kotakis' discharge case was handled by his union from the beginning through to an unfavorable result before the Adjustment Board. Kotakis then filed an action in district court seeking review of the award; following dismissal of his lawsuit as it related to review of the award, Kotakis appealed to the Seventh Circuit, urging as one ground, failure of the Adjustment Board to give him notice pursuant to Section 153, First (j). The Seventh Circuit observed that the notice issue, having been neither pleaded nor

argued in the district court, was not properly before it, but nevertheless considered the issue:

> "Moreover, the record discloses that plaintiff knew his grievance had been submitted to the Adjustment Board and that he had authorized the union to represent him there. That satisfies the notice requirement. *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 327 U.S. 661, 666-667, 66 S.Ct. 721, 90 L.Ed. 928." 520 F2d at 576.

Although Kotakis, unlike LaFontaine, did not take the position that notice was required because he wished to be present,[17] nevertheless the result below and the holding in *Kotakis* are in conflict for in neither case is any prejudice alleged or shown, and in both cases the employee's union had unrevoked authority to act in his behalf, including the authority to receive notice.

The National Mediation Board itself recently took note of the appearance of a conflict between *Cole* and *Kotakis*:

> "The issue of whether, absent official notice from an adjustment board, a claimant has received 'due notice' as provided in section 3, first (j) of the act, 45 U.S.C. § 3, first (j), was dealt with by two courts of appeal during the period covered by this report. The seventh circuit in the *Kotakis* case, supra, found sufficient

[17] We note in passing that it is exceedingly doubtful that LaFontaine had any right to demand to be present so long as his union's authority to act had not been revoked, for Section 153 First (j) provides that parties may be *"heard either* in person, by counsel, *or* by other representatives, as they may *respectively elect. . . ."* (emphasis supplied.)

> notice upon the simple showing that a claimant had authorized his collective bargaining representative to represent him before the Adjustment Board with respect to his grievance and knew that his grievance had been submitted to the Board. However, in *Cole* v *Erie Lackawanna Ry.*, 541 F.2d 528, (6 Cir. 1976), cert. denied, — U.S. — (1977) the sixth circuit found such knowledge and authorization insufficient notice within the meaning of section 3, first (j) where the claimant had been informed by his representative that he need not bring witnesses to the hearing on his claim and that he could not appear at the hearing." Forty-Second Annual Report, supra, p. 24.

We have no doubt that the Mediation Board would at the very least be of the same opinion as to the ruling and result below.

For these reasons, we submit that the ruling below, in tandem with *Cole*, misconstrues and is contrary to *Burley (I)* and *(II)* and thus is in conflict with *Kotakis*. However, even if we are mistaken in whole or in part, the matter is far more significant than merely whether a public law board ought to take the time to mail something to an employee or be denied the power to enter a binding award, because inextricably drawn into question is the extent to which a union currently has authority to act, and the correlative question how far beyond the mere giving of notice a public law board is obliged to go in protecting an employee's *Burley* rights. The ruling below, extending *Cole* to all public law board cases at the very least raises these questions and disposes of them without any consideration of them or

of the implicit effects of the ruling on them. The matter of the interplay of union authority before a public law board with protection of employee rights, goes to the very essence of the integrity of the public law board process. Whether or not our position is correct in the end is immaterial. For these matters are far too important to the administration of the Railway Labor Act to be left standing as they are now.

D. Conclusion

The clear import of the ruling of the Sixth Circuit below is to extend the holding in *Cole* to any and every case submitted to a public law board so that, if notice is not given by the Board to the employee, the otherwise valid award may be set aside upon his motion, for that reason, and that reason alone without regard to prejudice. In part B of our argument, we have marshalled the reasons why Congress did not intend that the provisions of Section 153 First (j) apply to public law boards, and in part C we demonstrated that, even if that section were applicable to public law boards, notice of hearing to the union was satisfactory in the absence of some reason for the Board to believe that the union had something less than full authority to act on behalf of its member.

At the time this Court was considering whether to hear *Cole*, a case involving prejudice resulting to an employee who had not received notice of hearing, this case in which no prejudice for lack of notice was alleged or proved, was pending before the Sixth Cirtuit. After this Court declined to review *Cole*, the Sixth Circuit, relying strictly upon its decision there and this Court's denial of certiorari, summarily affirmed the lower court, and in so doing, extended *Cole* from cases involving prejudice from lack of notice to all cases. We submit that whatever may have then been this Court's reasons for declining to hear *Cole*, the ruling below requires a fresh review by this Court now in a setting much more appropriate for consideration of the important question of the interplay of employee rights under *Burley (I)* and their protection with union authority to act on behalf of its members in the context of the new public law board mechanism.[18]

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[18] We have not mentioned the burden, let alone unfairness to an employer like the railroad here, innocent of knowledge of some violation by the union of an employee's *Burley (I)* rights, in the public law board arena, of the result reached below, because we think it goes without saying.

For the reasons stated in the Petition, a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. STRAUB
407 One Northland Plaza
20755 Greenfield Road
Southfield, Michigan 48037
Phone: (313) 552-5000

JAMES M. BAYSINGER
JONATHAN S. TAUB
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
Phone: (313) 259-1144

Counsel for Petitioner

OF COUNSEL:

CROSS, WROCK, MILLER & VIESON
400 Renaissance Center
Suite 1900
Detroit, Michigan 48243
Phone: (313) 259-1144

Dated: August 24, 1978

APPENDIX

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed June 1, 1978)

(Robert LaFontaine, Plaintiff-Appellee, v The Chesapeake and Ohio Railway Company, Defendant-Appellant. No. 76-2491)

BEFORE: LIVELY and MERRITT, Circuit Judges; and RUBIN,* District Judge.

No judge in regular active service on the court having requested consideration en banc, the petition for rehearing filed herein by the defendant-appellant has been referred to the panel which heard the appeal.

Upon careful consideration of the petition for rehearing the court concludes that the arguments contained therein were fully considered upon the original submission and decision of the appeal.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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*The Honorable Carl B. Rubin, Judge, U. S. District Court for the Southern District of Ohio, sitting by designation.

ORDER

(United States Court of Appeals
For the Sixth Circuit)

(Filed April 18, 1978)

(Robert LaFontaine, Plaintiff-Appellee, v Chesapeake and Ohio Railroad Company, Defendant-Appellant. No. 76-2491)

BEFORE: LIVELY and MERRITT, Circuit Judges; and RUBIN, District Judge.*

The sole issue in this case is whether an employee on whose behalf a union had submitted a claim of wrongful discharge to a Public Law Board created pursuant to the Railway Labor Act was entitled to actual notice of the hearing before the Public Law Board. In *Cole v. Erie Lackawana Railway Co.*, 541 F.2d 528 (1976), cert. denied, 433 U.S. 914 (1977), this court held that actual notice of a hearing is required "for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." We conclude that the quoted language is dispositive of this appeal.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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*The Honorable Carl B. Rubin, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

ORDER REMANDING CASE TO PUBLIC LAW BOARD

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed April 30, 1976)

(Robert LaFontaine, Plaintiff, v The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

At a session of said Court held in the U.S. District Court, Detroit, Michigan on April 19, 1976

PRESENT: HONORABLE James P. Churchill
U. S. District Judge

This matter having come on to be heard upon motion of the Plaintiff and the Court being fully informed in the premises;

IT IS HEREBY ORDERED that the decision of the Public Law Board 347 upholding Plaintiff's discharge be set aside and that this matter be remanded to said Public Law Board for rehearing on the merits.

Honorable /s/ Fred W. Kaess
U. S. District Judge

For Judge James P. Churchill

ORDER GRANTING IN PART AND CONDITIONALLY DENYING IN PART MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF RIGHT TO AMEND COMPLAINT

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed February 13, 1975)

(Robert LaFontaine, Plaintiff, v The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on Feb. 11, 1975

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge

IT IS HEREBY ORDERED that the defendant's motion for summary judgment filed in the above-entitled matter be and hereby is granted in part and conditionally denied in part, and that the plaintiff be and hereby is granted leave to file an amended complaint as set forth in the Court's Memorandum Opinion; for the reasons set forth in a Memorandum Opinion of the Court entered on this date.

/s/ James P. Churchill
United States District Judge

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(Filed February 13, 1975)

(Robert LaFontaine, Plaintiff, v The Chesapeake and Ohio Railway Company, Defendant. No. 74-71397)

This is an action for review of an award made by a special grievance board following the firing of a railroad employee for assaulting another employee. The petition alleges that plaintiff was employed as a yardman in Detroit by defendant railroad. On April 26, 1971, he was involved in an altercation with a fellow employee, J. H. Flatt. Pursuant to railroad procedure, a hearing was held before the trainmaster shortly thereafter; plaintiff was found to be at fault and was discharged from service. A claim for back pay and reinstatement was taken before the Public Law Board #347 pursuant to procedure agreed to by defendant and plaintiff's collective bargaining representative, the United Transportation Union. The claim was denied on January 19, 1973.

Plaintiff prays that he be ordered reinstated with back pay, or in the alternative, that the Board's decision be vacated and the matter be remanded for a new hearing. The asserted basis for such relief is that the original hearing was procedurally unfair because the same

union representative served both plaintiff and J. H. Flatt at the trainmaster's hearing; that the Public Law Board hearing was unfair in that the transcript of the earlier hearing should not have been relied upon by the Public Board because the trainmaster's hearing had been conducted in total disregard of the rules of evidence; and in that the plaintiff here did not receive proper notice of the hearing. This last claim was raised only in plaintiff's brief; it does not appear in his complaint.

The defendant railroad has moved for summary judgment alleging lack of jurisdiction over the subject matter as well as failure to state a cause of action. These are both defenses which can be raised by motion to dismiss under [2] Rule 12(b), F.R.C.P. The Court will construe this motion for summary judgment as a motion to dismiss under Rule 12(b)(1) and 12(b)(6).

Defendant claims that jurisdiction to review awards of Special Adjustment Boards does not lie in the district courts. In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), it was held that:

> "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. Union Pacific R. Co. v. Price, 360 U.S. 601 (1959)." 406 U.S. at 325.

To some extent that principal [sic] is modified by the terms of the statute under which Special Boards are created. 45 U.S.C. Section 153 provides for jurisdiction in the district court to enforce awards of such boards. The terms of awards may be set aside under the statute only if a party alleges that the order exceeds the

scope of the Board's jurisdiction, that the Board failed to comply with statutory requirements, or for fraud or corruption by a member of the Board.

This suit is not for enforcement of an order; nor does it allege any of the three grounds which would put it properly before a district court if enforcement were the issue. Rather, the suit is to set aside an order because of procedural irregularities at both the trainmaster's hearing and the hearing before the Special Board. The statute does not authorize review for those purposes. There is, however, case law authority for review of Special Board decisions where they are tainted by due process violations. The Seventh Circuit has held:

> "The sound conclusion to be drawn from the statute (the Railway Labor Act) and the various decisions, seems to be that, *in the absence of any question as to the regularity of proceedings before the board* for lack of notice or other defect preventing due process of law, the district court has no right to review an order of the board." *Ellerd v. Southern Pacific R. Co.*, 241 F.2d 541 (CA7 1957). (Emphasis supplied.)

Thus, the defendant's position that review is unavailable is not necessarily valid if the plaintiff has alleged a denial of due process in the hearing procedure.

In *Edwards v. St. Louis-S.F. RR Co.*, 361 F.2d 946 (CA7 1966), it was held that only in cases where the alleged denial of due process occurred before the Public Law Board would jurisdiction lie with the district court for review. If the alleged due process violation occurred at the initial trainmaster's hearing on the railroad property, the district court lacks jurisdiction to review

the award. This district has recently adopted the holding of the *Edwards* case in an opinion by Judge Gubow in the case of *Richard Wenzel v. Chesapeake & Ohio Railway Co. et al.*, Civil Action 74-71578, decided December 23, 1974.

[3] Therefore, the motion to dismiss will be granted with respect to all claims raised by the plaintiff except the issue of the adequacy of the notice to plaintiff of the Special Board hearing. District courts lack jurisdiction over the subject matter of those claims which are here dismissed. This is not to say that the allegations of unfairness at the trainmaster's hearing would be foreclosed should this Court remand for a rehearing by the Special Board on the grounds of lack of due notice. Under the terms of paragraph 8 of the agreement between the railroad and the union establishing the Special Board, each party to a claim before such Board may present evidence and statements of fact at the hearing before the Board. The issue of fairness of representation and the use of the trainmaster's hearing transcript can properly be raised at such a hearing.

Heretofore, that claim of lack of notice has only been raised in plaintiff's brief. The Court hereby grants plaintiff leave to file an amended complaint to include such a claim. If the amendment is filed within twenty (20) days of the date of filing of this order, the order granting the motion to dismiss as to the notice claim will be denied. If no such amendment is filed within such time, the motion to dismiss will be granted.

/s/ James P. Churchill
United States District Judge

Dated: February 11, 1975